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# Table Dancing around the First Amendment: The Constitutionality of Distance Requirements in Colacurcio v. City of Kent

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## TABLE DANCING AROUND THE FIRST AMENDMENT: THE CONSTITUTIONALITY OF DISTANCE REQUIREMENTS IN *COLACURCIO v. CITY OF KENT*

### I. INTRODUCTION

Although the United States Supreme Court has held that nude dancing is a form of protected speech under the First Amendment, local and municipal governments have sought to regulate it through various types of laws.[1] For instance, an ordinance may require dancers to remain a certain distance from their patrons to prevent drug transactions and prostitution solicitations.[2] Although the Supreme Court has never decided the constitutionality of such regulations, various federal courts have upheld these laws.[3] In so doing, these courts acknowledged that distance requirements restrict a dancer's expression but sustained distance laws because they serve a substantial governmental interest.[4] Yet, other courts have

1. *See generally* Daniel J. McDonald, *Regulating Sexually Oriented Businesses: The Regulatory Uncertainties of a "Regime of Prohibition by Indirection" and the Obscenity Doctrine's Communal Solution*, 1997 BYU L. REV. 339, 342 (1997). Such businesses have been regulated via zoning ordinances, licensing requirements, nuisance laws, the Federal Racketeer Influenced and Corrupt Organization Act (RICO), obscenity laws, and public indecency statutes. *See id.* at 341. Regardless of the regulatory tool chosen, adult businesses have frequently challenged the constitutionality of the particular restriction placed upon them. *See id.* at 342.

2. *See* DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 410 (6th Cir. 1997). A distance requirement could be a regulation of speech under the First Amendment because it restricts a dancer's ability to freely express herself; this is determined on a case-by-case basis. *See id.* at 409.

3. *See id.* at 415 (upholding constitutionality of six-foot distance requirement); *see also* Zanganeh v. Hymes, 844 F. Supp. 1087, 1089 (D. Md. 1994) (six-foot); T-Marc, Inc. v. Pinellas County, 804 F. Supp. 1500, 1506 (M.D. Fla. 1992) (three-foot); City of Colorado Springs v. 2354 Inc., 896 P.2d 272, 298 (Colo. 1995) (three-foot); Ino Ino, Inc. v. City of Bellevue, 937 P.2d 154, 168-69 (Wash. 1997) (four-foot).

4. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986) (holding that restriction upon symbolic expression is constitutionally permissible as long as it is aimed at ameliorating secondary effects of speech and not speech itself); *see also* Dana M. Tucker, *Preventing the Secondary Effects of Adult Entertainment Establishments: Is Zoning the Solution?*, 12 J. LAND USE & ENVTL. L. 383 (1997) (outlining relationship between adverse secondary effects and adult entertainment establishments).

recognized that such distance regulations restrict a dancer's ability to express herself artistically and to speak to patrons.[5]

In *Colacurcio v. City of Kent*,[6] the United States Court of Appeals for the Ninth Circuit considered whether a municipality may constitutionally impose a ten-foot distance requirement between a nude dancer and her patron.[7] The owners of an adult entertainment establishment argued that this requirement was unconstitutional because it effectively banned table dancing, a unique form of protected expression.[8] The government countered that the ordinance was a content-neutral restriction aimed at controlling the harmful effects of nude dancing and was, therefore, a valid time, place and manner restriction.[9]

This Note examines the holding and rationale provided by the Ninth Circuit in *Colacurcio* as well as the implications a ten-foot distance requirement has for First Amendment jurisprudence and individual dancers. First, this Note details the facts of *Colacurcio*.[10] Second, this Note provides an overview of the First Amendment and its application to symbolic speech, specifically nude dancing.[11] Third, this Note explains the Ninth Circuit's rationale supporting its holding in *Colacurcio*.[12] Fourth, this Note analyzes the court's reasoning based on prior holdings and additional authority.[13] Finally, this Note examines the likely consequences of the court's holding in *Colacurcio*.[14]

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5. *See, e.g.*, Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1061 (9th Cir. 1986) (enacting distance requirement to "prevent patrons and dancers from [the verbal discourse which is necessary in] negotiating for narcotics transfers on the premises of an erotic dance studio").

6. 163 F.3d 545 (9th Cir. 1998).

7. *See id.* at 548.

8. *See id.* at 549.

9. *See id.* The owners also argued that table dancing is a primary source of income for their dancers and that the ordinance would consequently make it impossible to successfully run a studio in Kent. *See id.*

10. For a discussion of the facts and procedural background of *Colacurcio*, see *infra* notes 15-27 and accompanying text.

11. For an analysis of prior cases dealing with the First Amendment, symbolic speech, and nude dancing, see *infra* notes 28-99 and accompanying text.

12. For an examination of the Ninth Circuit's reasoning in *Colacurcio*, see *infra* notes 100-55 and accompanying text.

13. For a critical analysis of the court's holding and rationale in *Colacurcio*, see *infra* notes 156-83 and accompanying text.

14. For a discussion of the potential consequences of this decision, see *infra* notes 184-90 and accompanying text.

## II. FACTS

In April 1995, the City of Kent, Washington ("City of Kent" or "City") amended its Adult Entertainment Ordinance to prohibit nude dancing at a distance of less than ten feet from patrons.[15] Before the amendment was enacted, plaintiff Frank Colacurcio had secured a site in the City of Kent to open a non-alcoholic adult nightclub featuring nude table dancing.[16] The subsequent amendment to the ordinance effectively eliminated nude table dancing as a lawful form of entertainment by banning nude dancing less than ten feet from patrons. Therefore, Colacurcio brought suit challenging the ordinance as a violation of freedom of expression under the First Amendment.[17]

Before the City of Kent amended the ordinance, it spent several years examining adult entertainment.[18] In 1994, Colacurcio had challenged the City's initial regulatory ordinance.[19] In that case, the district court noted that the zoning ordinance failed to designate a sufficient number of permissible locations for adult entertainment businesses.[20] As a result of this decision, the City and Colacurcio executed a settlement agreement that permitted the proposed nightclub to operate as a lawful non-conforming use under the zoning law.[21]

On March 7, 1995, the City of Kent adopted Adult Entertainment Ordinance 3214, which established "new standards for the licensing and operation of adult uses in the City of Kent."[22] After the enactment of this ordinance, the King County Superior Court ruled on a similar adult entertainment ordinance in Bellevue, Washington.[23] To comply with the court's ruling in that case, the City of

15. *See* Colacurcio v. City of Kent, 163 F.3d 545, 549 (9th Cir. 1998). The city felt that an amendment to its ordinance was necessary in order to conform the legislation to a recent decision handed down by the King County Superior Court based on a similar ordinance in Bellevue, Washington. *See id.*

16. *See id.* at 548.

17. *See id.* at 549.

18. *See id.* at 548. During this examination, the city's planning department published a study reporting the effects of adult entertainment on surrounding communities. *See id.*

19. *See id.*

20. *See Colacurcio*, 163 F.3d at 548.

21. *See id.* Although Colacurcio had not yet obtained the building permit for the site he had chosen, the settlement agreement would permit his proposed night club as a lawful non-conforming use once the permit was issued. *See* Colacurcio v. City of Kent, 944 F. Supp. 1470, 1471 (W.D. Wash. 1996).

22. *Colacurcio*, 944 F. Supp. at 1471.

23. *See* Ino Ino, Inc. v. Bellevue, 937 P.2d 154 (Wash. 1997).

Kent amended its ordinance, which is now codified as Kent City Code Section 5.10.010 *et seq.*[24]

Soon after the City adopted the amended ordinance, the plaintiff brought this action for declaratory relief and damages pursuant to 42 U.S.C. § 1983.[25] Colacurcio argued that because the statute effectively eliminated all nude table dancing, which is a unique form of expression, the statute warranted separate First Amendment analysis.[26] Nonetheless, the United States District Court for the Western District of Washington found in favor of the City of Kent and plaintiff filed a timely appeal.[27]

## III. BACKGROUND

### A. First Amendment, Generally

The First Amendment of the United States Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[28] The most widely accepted justification for the freedom of speech is that the pursuit of truth in a democratic society requires the free and unfettered flow of valuable ideas.[29] Free speech has been called "one of the

24. *See Colacurcio*, 944 F. Supp. at 1471. The new ordinance provides in part:

> The portion of the exotic dance studio premises in which dancing and adult entertainment by an entertainer is performed shall be a stage or platform at least twenty-four (24) inches in elevation above the level of the patron seating areas. [KCC 5.10.110(A)]. All dancing and adult entertainment by an entertainer shall occur on the entertainment performance areas intended for that purpose . . . . No dancing or adult entertainment by an entertainer shall occur closer than ten (10) feet to any patron.

*Id.* The statute also provides minimum lighting requirements and prohibits dancers from receiving tips from patrons. *See Colacurcio*, 163 F.3d at 549.

25. *See Colacurcio*, 163 F.3d at 549.

26. *See id.*

27. *See id.* The district court ruled that "(1) the ordinance was a content-neutral time, place and manner regulation; and (2) the ten-foot distance requirement was narrowly tailored and left open ample alternative avenues for communication of protected artistic expression." *Id.*

28. U.S. CONST. amend. I. This law applies to the states via the due process clause of the Fourteenth Amendment. *See* U.S. CONST. amend. XIV (stating that no state shall deprive any person of life, liberty or property without due process of law).

29. *See generally* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (holding free speech is vehicle for promoting truth discovery); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (adopting John Stuart Mills' theory that free speech is vehicle for promoting truth discovery). In addition, "the First and Fourteenth Amendments remove 'governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity

preeminent rights of western democratic theory [and] the touchstone of individual liberty."[30]

The extent of governmental regulation of First Amendment speech depends on the type of speech at issue.[31] The United States Supreme Court has held that freedom of speech is not absolute, and certain forms of speech lack value and are not intended to fall within the ambit of the First Amendment.[32] The Court has, however, limited the circumstances under which a court may find that speech is unprotected.[33] For example, in *Cohen v. California*,[34] the Court held that the words "Fuck the draft" were protected speech because these words had an emotive content.[35] Further, in *Brandenburg v. Ohio*,[36] the Court held that speech advocating unlawful action is unprotected only where "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[37]

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. . . .'" Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 (1980) (quoting Cohen v. California, 403 U.S. 15, 24 (1971)).

30. JOHN E. NOWAK, ET AL., CONSTITUTIONAL LAW 830 n.1 (3d ed. 1986).

31. *See generally* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983) (ruling that commercial speech is subject to limited First Amendment protection); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 570-71 (1980) (holding suppression of advertising contrary to purpose of First Amendment); Buckley v. Valeo, 424 U.S. 1, 44-59 (1976) (stating restrictions on political speech are subject to rigorous scrutiny).

32. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). In famous dicta of that case, Justice Murphy stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

*Id.* at 571-72; *see also* Miller v. California 413 U.S. 15, 34-37 (1973) (holding that obscenity lacks value in "marketplace of ideas" and is therefore undeserving of constitutional protection); Richard B. Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. CIN. L. REV. 739, 753 (1991) (recognizing that First Amendment does not prohibit government from regulating such expressive acts as perjury and solicitation of murder).

33. For a discussion of these cases, see *infra* notes 34-37 and accompanying text.

34. 403 U.S. 15 (1971).

35. *See id.* at 16, 26. In *Cohen*, Justice Harlan explained that the government should not make principled distinctions between different kinds of speech since "one man's vulgarity is another's lyric." *Id.* at 25.

36. 395 U.S. 444 (1969).

37. *See id.* at 447. In *Brandenburg*, defendant was a leader of an Ohio Ku Klux Klan group. *See id.* He was charged with violating Ohio's criminal syndicalism statute, which forbade the use of advocacy of crime or violence as a means of ac-

## B. Government Regulations on Speech

When the government seeks to restrict or regulate protected speech, the degree of scrutiny that a court will apply to the regulation depends on whether the court views the regulation as content-based or content-neutral.[38] Content-based restrictions are based on the message conveyed; that is, speech is restricted because of the ideas or information it contains.[39] Government regulation cannot control the content of speech unless it serves "a compelling state interest and is narrowly drawn to achieve that end."[40]

By contrast, regulations governing the time, place and manner of speech that are unrelated to the suppression of First Amendment rights do not violate the First Amendment.[41] In *Ward v. Rock Against Racism*,[42] the Supreme Court held that a municipality may impose reasonable restrictions on the time, place and manner of protected speech, provided the restrictions: (1) are content-neutral;

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complishing political or social reform. *See id.* at 445-46. The Court struck down the Ohio statute without considering whether defendant's speech could actually be proscribed. *See id.* at 448. In so doing, the Court reasoned that speech advocating force or crime could be proscribed only if: (1) the advocacy is "directed to inciting or producing imminent lawless action;" and (2) is "likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447.

The Supreme Court has never found a case that met the *Brandenburg* standard. For example, in *Hess v. Indiana*, 414 U.S. 105 (1982), the Court held that the following speech was protected because it failed to meet *Brandenburg*: "We'll take the fucking street later [or again]." *Id.* at 108-09. Further, in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Court held protected the following speech by an NAACP official: "[I]f we catch any of you going in any of them racist stores, we're going to break your damn neck." *Id.* at 902, 926.

38. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 7-8 (2d ed. 1988). In constitutional analysis, "scrutiny" refers to how closely the court will analyze and question a government action or legislative act. *See id.* The level of scrutiny that a court will apply depends upon how much the governmental regulation burdens the asserted right and the level of importance that the court has assigned to that asserted right. *See id.* In First Amendment speech analysis, courts essentially balance the speaker's asserted interest against the government's asserted interest. *See id.*

39. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 461 (1980) (invalidating statute that permitted dissemination of information on labor disputes but prohibiting all other issues); Police Dep't v. Mosely, 408 U.S. 92, 100 (1972) (invalidating statute allowing labor picketing but disallowing non-labor picketing).

40. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987) (citation omitted). This type of analysis, which is commonly referred to as strict scrutiny, has been described as "strict in theory, but fatal in fact," as nearly all laws of this genre will be struck down as violative of the First Amendment. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980).

41. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 554-55 (1965) (upholding law restricting demonstration on busy street during rush hour); Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (upholding law prohibiting two parades from marching simultaneously down same street).

42. 491 U.S. 781 (1989).

(2) are narrowly tailored to serve a significant governmental interest; and (3) leave open ample channels of communication.[43]

## C. Symbolic Speech

The Supreme Court has long recognized that the First Amendment protects a citizen's right to free expression as well as free speech.[44] Conduct is expressive when there is: (1) "intent to convey a particularized message" and (2) a substantial likelihood "that the message would be understood by those who viewed it."[45]

In *United States v. O'Brien*,[46] the Court articulated a test for determining whether laws restricting symbolic speech are constitutional.[47] The Supreme Court has determined that the *O'Brien* test and the *Ward* test are virtually identical in application.[48] Laws that

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43. *See id.* at 791 (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)). In determining whether an ordinance is content-neutral, the touchstone inquiry is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* An ordinance is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799. An ordinance will be held to leave open ample channels of communication unless it would foreclose an entire medium of expression across the landscape of a particular community or setting. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 524-28 (1981) (Brennan, J., concurring).

44. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (conceding that burning draft card contains communicative element but sustaining law as appropriate means of serving government interest in effective draft administration); *see also* United States v. Eichman, 496 U.S. 310, 313-16 (1990) (holding flag burning protected activity under First Amendment); Spence v. Washington, 418 U.S. 405, 410-11 (1974) (holding peace symbol placed on American flag expression for First Amendment purposes); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 510-13 (1969) (holding black arm bands worn in protest of Vietnam War constituted expressive activity within meaning of First Amendment).

45. *Spence*, 418 U.S. at 410-11. The Supreme Court applied the *Spence* factors in *Ward* and held that "[m]usic is one of the oldest forms of human expression," and was therefore protected symbolic speech. *Ward*, 491 U.S. at 790. The *Ward* Court observed that "[f]rom Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions . . . ." *Id.*

46. 391 U.S. 367 (1968).

47. *See O'Brien*, 391 U.S. at 377 (holding that valid restriction of speech: (1)must be within constitutional power of government; (2)must further important/substantial interest; (3)must be unrelated to suppression of free expression; and (4)must ensure restriction on First Amendment freedoms is not greater than governmental interest).

48. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984) (stating that "validating a regulation of expressive conduct . . . is little, if any, different from the standard applied to time, place or manner restrictions.").

regulate symbolic speech have been governed by either of these two standards.[49]

### D. Regulating Adult Entertainment

Local and municipal governments have sought to regulate the adult entertainment industry in a variety of ways.[50] Such businesses have been regulated through zoning ordinances, licensing requirements, nuisance laws, the Federal Racketeer Influenced and Corrupt Organization Act (RICO), obscenity laws, and public indecency statutes.[51] Regardless of the regulatory scheme, adult businesses have consistently challenged the constitutionality of the particular restriction placed upon them.[52] Thus far, the Supreme Court has often sustained these challenges, holding that adult businesses are entitled to First Amendment protection.[53] As a result of

49. *See* Barnes v. Glen Theatre Inc., 501 U.S. 560, 566-67 (1991) (applying *O'Brien* test); *see also* Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1058-62 (9th Cir. 1986) (applying *Ward* test).

50. *See* McDonald, *supra* note 1, at 341 (outlining various regulatory approaches).

51. *See id.* Zoning ordinances are the most common regulatory tool, as historically "local zoning regulation has enjoyed a strong presumption of validity when challenged." *Id.* at 341 n.10 (quoting Steven I. Brody, *When First Amendment Principles and Local Zoning Regulations Collide*, 12 N. ILL. U. L. REV. 671, 672 (1992)).

52. *See* McDonald, *supra* note 1, at 342. These challenges are usually based on the First Amendment and, more specifically, contend that the services or products provided by the adult business are forms of expression deserving constitutional protection from governmental regulation. *See id.*; *see also Barnes*, 501 U.S. at 563 (contending that nude dancing is expressive conduct protected by First Amendment); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-49 (1986) (contending that adult movie theater is expressive conduct within meaning of First Amendment); Young v. American Mini Theatres, Inc., 427 U.S. 50, 62 (1976) (same).

53. *See, e.g.*, *Barnes*, 501 U.S. at 565 (recognizing that in certain cases nude dancing is protected form of expression under First Amendment); *Renton*, 475 U.S. at 46-49 (finding adult movie theater entitled to First Amendment protection); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 72-76 (1981) (holding ordinance prohibiting live nude dancing unconstitutional); *Young*, 427 U.S. at 70 (finding movie theater that displayed sexually explicit films on regular basis entitled to First Amendment protection); Jenkins v. Georgia 418 U.S. 153, 161 (1974) (holding "nudity alone is not enough to make material legally obscene . . . .").

By contrast, the Court has stated that nudity cannot "be exhibited or sold without limit" in public places. Miller v. California, 413 U.S. 15, 26 (1973). The *Miller* Court announced that material is obscene if:

> (a) [t]he average person, applying contemporary community standards would find that the work, taken as a whole, appeals to prurient interests; (b) [t]he work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) [t]he work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.* at 24. However, the Supreme Court's tendency to engage in a First Amendment analysis of cases involving nude dancing indicates that it does not view all

the fragmented nature of Supreme Court decisions dealing with adult entertainment's level of First Amendment protection, a body of murky and unmanageable case law has emerged.[54]

1. *Zoning Laws*

In *Young v. American Mini Theatres, Inc.*,[55] the City of Detroit passed a zoning ordinance prohibiting the operation of any adult movie theater, bookstore, and other similar establishments from locating within 1000 feet of any other establishment or within 500 feet of any residential area.[56] A plurality of the Supreme Court upheld the ordinance as constituting a valid time, place and manner restriction because it was designed to "preserve the quality of urban life" by avoiding or militating against the secondary effects of the regulated businesses.[57] While the plurality argued that First Amendment protection of nude dancing is not absolute, five Justices argued that First Amendment protection should not vary with the social value accredited to the speech by the judiciary.[58]

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nude dancing as obscene and unprotected. *See, e.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975) (stating, "[A]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, . . . this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances.").

54. For a discussion of cases involving the constitutionality of government regulation of sexually oriented businesses, see *infra* notes 56-99 and accompanying text.

55. 427 U.S. 50 (1976).

56. *See id.* at 52. The ordinances were based on findings of the Detroit Common Council and financial experts that these types of businesses tended to negatively effect property values in the neighboring community, cause an increase in prostitution and encourage residents and businesses to locate elsewhere. *See id.* at 54-55.

57. *Id.* at 71. While the Court observed that the First Amendment would not tolerate an absolute ban on adult entertainment that arguably had some artistic value, the plurality argued that this type of expression is entitled to a lesser degree of protection than more valuable forms of speech, such as political debate. *See id.* at 70 (noting, "[f]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."). In response, the dissent argued:

> [I]f the guarantees of the First Amendment were reserved for expression that more than a "few of us" would take up arms to defend, then the right of free expression would be defined and circumscribed by current popular opinion. The guarantees of the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty.

*Id.* at 86 (Stewart, J., dissenting).

58. *See id.* at 73 n.1 (Powell, J., concurring) (stating, "I do not think we need reach, nor am I inclined to agree with, the holding . . . that nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression.").

Since *Young*, the Supreme Court has upheld similar content-neutral zoning regulations of adult businesses based on their negative secondary effects.[59] For example, in *City of Renton v. Playtime Theatres*,[60] the Court noted that for the government to withstand a First Amendment challenge to a particular regulatory scheme, it must demonstrate that the regulated activity has negative secondary effects on the neighboring community.[61] To meet this burden, the Court held that a city does not need to conduct its own studies or show that such effects have existed in the particular locality before the ordinance is enacted.[62] The Ninth Circuit in *Tollis, Inc. v. San Bernardino County*[63] later espoused *Renton*.[64]

In contrast to *Young* and *Renton*, the Court in *Schad v. Borough of Mt. Ephraim*[65] struck down a local time, place and manner zoning ordinance that banned all adult theaters from every commercial district in the city.[66] The Court reasoned that the municipality pro-

59. *See* City of Renton v. Playtime Theatres, 475 U.S. 41, 54 (1986) (finding ordinance valid due to problems adult theaters may create). In *City of Renton*, a suit was brought challenging the constitutionality of a zoning ordinance that prohibited "adult motion picture theaters from locating within 1,000 feet of any residential zone, single-or multiple-family dwelling, church, park, or school." *Id.* at 43. The Supreme Court held that the *City of Renton* ordinance was a valid content-neutral regulation because it was "justified without reference to the content of the regulated speech." *Id.* at 48 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).

60. 475 U.S. 41 (1986).

61. *See id.* at 52-53.

62. *See id.* at 51-52. The Court stated:

> Renton was entitled to rely on the experiences of . . . other cities to show the negative effects that such businesses could generate because [t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

*Id.*

63. 827 F.2d 1329, 1332 (9th Cir. 1997). The *Tollis* Court held:

> If the ordinance is predominantly aimed at the suppression of first amendment [sic] rights, then it is content-based and presumptively violates the first amendment [sic]. If, on the other hand, the predominant purpose of the ordinance is aimed at the amelioration of secondary effects [in the surrounding community], then the ordinance is content-neutral and the court must then determine whether the ordinance passes constitutional muster as a content-neutral time, place, and manner restriction.

*Id.* at 1332 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46 (1986)).

64. *See id.* at 1333 (finding ordinance needed to be narrowly tailored and thus failed to meet third prong of *City of Renton* test).

65. 452 U.S. 61 (1981).

66. *See id.* at 76-77. The banned theaters contained both live entertainment and nude dancing. *See id.*

vided no conclusive evidence of a substantial interest in prohibiting all forms of adult entertainment, and the municipality failed to prove that there were alternative channels of communication open to the businesses affected by the regulation.[67]

2. *Distance Requirements*

In *Kev, Inc. v. Kitsap County*,[68] the Ninth Circuit concluded that a local ordinance, which regulated the manner in which nude dancing could be performed, did not significantly infringe upon First Amendment rights.[69] The ordinance imposed distance requirements upon dancers' performances.[70] The alleged purpose of the regulations was to deter patrons and dancers from negotiating for drugs and prostitution at nude dancing establishments.[71] By following the "secondary effects" rationale set forth in *Young* and *Renton*, the *Kev* Court reasoned that the ordinance was a valid time, place and manner restriction.[72] The Sixth Circuit reached a similar conclusion in *DLS, Inc. v. City of Chattanooga*.[73]

67. *See id.* at 73-76. According to the Court, the decision in *Young* did not govern this case because in *Young*, "[t]he restriction did not affect the number of adult movie theaters that could operate in the city; it merely dispersed them." *Id.* at 71.

68. 793 F.2d 1053 (9th Cir. 1986).

69. *See id.* at 1061-62 (concluding regulations are "reasonable time, place, and manner restrictions that only slightly burden speech"). The ordinance provided that:

> All dancing shall occur on a platform intended for that purpose which is raised at least two feet (2') from the level of the floor . . . . No dancing shall occur closer than ten feet (10') to any patron . . . . No dancer shall fondle or caress any patron and no patron shall fondle or caress any dancer . . . . No patron shall directly pay or give any gratuity to any dancer [and] no dancer shall solicit any pay or gratuity from any patron.

*Id.* at 1061 (citation omitted).

70. *See id.*

71. *See id.* To bolster this argument, Kitsap County presented testimony that close contact between dancers and patrons facilitated these transactions. *See id.* at 1061.

72. *See id.* at 1062. Without offering any specific examples, the *Kev* court concluded that alternative channels existed for the plaintiffs to convey their erotic message. *See id.*

The Supreme Court has never decided the constitutionality of distance requirements. However, Justice White's dissent in Barnes v. Glen Theatre, Inc. suggests, at least in his view, that such regulations would be upheld. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 594 (1991).

73. 107 F.3d 403, 409 (6th Cir. 1997). The court held that the message involved was "an endorsement of erotic experience," nonetheless it upheld the ordinance under the *O'Brien* test for symbolic speech. *Id.* at 410. Initially, the court stated that the constitutional power of the City of Chattanooga was not at issue, so its inquiry involved only the last three of the four prongs of *O'Brien*. *See id.* With respect to the second prong, the court held that the six-foot buffer zone requirement furthered the important state interests of disease and crime prevention be-

3. *Licensing Schemes*

Local governments have likewise been permitted to regulate the adult entertainment industry through licensing schemes.[74] Municipalities must, however, proceed carefully in licensing regulations because American courts have historically disfavored this form of prior restraint.[75]

In *FW/PBS, Inc. v. City of Dallas*,[76] the Supreme Court considered the constitutionality of licensing procedure requirements for adult entertainment businesses.[77] The city integrated the licensing scheme with zoning and inspection regulations to circumvent the negative "secondary effects" of sexually oriented businesses in the community.[78] The Court held that Dallas' licensing scheme was an unconstitutional prior restraint of protected expression and lacked adequate procedural safeguards.[79]

4. *Public Indecency Laws*

In *Barnes v. Glen Theatre, Inc.*,[80] owners of a nude dancing establishment challenged a public indecency statute, which banned nude dancing altogether.[81] *Barnes* is one of the Supreme Court's

cause "courts have repeatedly found the prevention of crime and disease to satisfy this part of the *O'Brien* test." *Id.* With respect to the third prong of *O'Brien*, the court held that "controlling precedent establishes that the goals of crime and disease prevention are content-neutral" and "not at all inherently related to expression." *Id.* at 411. Finally, with respect to the fourth prong of *O'Brien*, the court held that the ordinance was no broader than necessary to achieve the city's goals of preventing crime and disease because "a buffer zone is necessary in order to ensure that the ban on contact is enforceable." *Id.* at 412.

74. *See Kev, Inc.*, 793 F.2d at 1062 (recognizing constitutionality of nude dancing licensing procedures in certain circumstances). *But see* FW/PBS Inc. v. City of Dallas, 493 U.S. 215, 223 (1990) (holding licensing scheme unconstitutional as allowing too much discretion on licensing authority); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560-62 (1975) (finding licensing of live theater entertainment establishment an unconstitutional prior restraint).

75. *See FW/PBS, Inc.*, 493 U.S. at 225 (stating that "[w]hile '[p]rior restraints are not unconstitutional per se . . . [a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity.'") (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1972)).

76. 493 U.S. 215 (1990).

77. *See id.* at 220.

78. *See id.* at 236 (asserting that these businesses contributed to increase in prostitution).

79. *See id.* at 223. According to the Court, the government "must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Id.* at 228.

80. 501 U.S. 560 (1991).

81. *See id.*

most recent articulations of the level of protection afforded to a sexually oriented business.[82] Applying the *O'Brien* test, the Court affirmed the constitutionality of Indiana's law as applied to the plaintiffs because of the state's interest in protecting morals and maintaining public order.[83] Moreover, the ordinance was narrowly tailored to effectuate a substantial governmental interest unrelated to the suppression of expression.[84]

Like *Young*, *Barnes* was a segmented decision and commanded only a plurality of the Court.[85] The four dissenters in *Barnes* argued for full First Amendment protection of nude dancing.[86] Justice White exemplified the communicative element of dancing when he stated "[in t]he varied manifestations of dancing . . . lies the common impulse to resort to movement to externalise states which we cannot externalise by rationale means."[87] Justice Scalia, who concurred in the judgment, felt that Indiana's public indecency law was a generally applicable law which did not implicate the First Amendment.[88]

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82. *See id.* at 565-66 (extending First Amendment protection to nude dancing). In *Barnes*, two establishments that wished to display nude erotic dancing challenged the constitutionality of Indiana's public indecency statute, which required exotic dancers to wear pasties and g-strings. *Id.* at 562-63. A plurality of the Court held that nude dancing is "expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so." *Id.* at 565-66.

83. *See id.* at 567-70.

84. *See id.* at 572. Applying the *O'Brien* test, the Court first decided that the enactment of a public indecency statute was clearly within the state's constitutional power. *See id.* at 567. The Court then held that the substantial government interest, protecting the order and morality amongst its citizens, passed the second prong of *O'Brien*. *See id.* at 569. Because the indecency law prohibited nudity in general, rather than specific expressive activity, the Court held the state interest was unrelated to the suppression of expressive activity. *See id.* at 570. Finally, because the ordinance requires that dancers wear pasties and g-strings and does not ban exotic dancing altogether, the Court concluded that the statute was no broader than necessary to effectuate the asserted governmental interest. *See id.* at 572.

85. *See Barnes*, 501 U.S. at 560-61.

86. *See id.* at 593-94 (White, J., dissenting). The dissent argued that the nudity component of nude dancing is the expressive activity at issue because nude dancing may generate thoughts and ideas, as well as evoke powerful emotions from its audience. *See id.* at 592. Furthermore, according to Justice White, the law failed *O'Brien* because the governmental interest in morality is about avoiding offense to onlookers, and the establishments in question exclude minors and contain only consenting viewers. *See id.* at 591.

87. *Id.* at 587-88 n.1 (White, J., dissenting) (quoting J. MARTIN, INTRODUCTION TO THE DANCE (1939)). Justice White further stated that "[g]enerating thoughts, ideas, and emotions is the essence of communication." *Id.* at 592.

88. *See id.* at 572 (Scalia, J., concurring). Justice Scalia rejected the dissent's rationale that the statute's only purpose for restricting nudity in public was to protect unwilling parties from offense. *See id.* at 574-75. Justice Scalia hypothesized, "[t]he purpose of Indiana's nudity law would be violated, I think, if 60,000 fully

5. *Circuit Conflict on Level of Protection of Nude Dancing*

Various circuit courts have rendered decisions regarding First Amendment protection of nude dancing.[89] In *BSA, Inc. v. King County*,[90] the Ninth Circuit invalidated a ban on topless dancing because "[w]here a regulation places a substantial restriction on free expression, as does this ban on nude dancing, it is subject to strict scrutiny."[91] In the court's opinion, the ordinance in question failed to serve a compelling state interest.[92] However, the court upheld the county's distance requirement as a valid time, place and manner regulation.[93]

Similarly, the Eleventh Circuit has given nude dancing constitutional protection.[94] In *International Food & Beverage System v. City of Fort Lauderdale*,[95] the court stated "[n]ude dancing is constitutionally protected expression, at least if performed indoors before paying customers and not in a street or park before casual viewers."[96]

The Eighth Circuit, in contrast, refused to extend First Amendment protection to nude dancing in *Walker v. City of Kansas City*.[97]

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consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd." *Id.* at 575. Scalia also concluded that laws of this type are designed to prevent activity that is traditionally considered to be immoral. *See id.*

89. *See, e.g.*, Walker v. City of Kansas City, 911 F.2d 80 (8th Cir. 1990); BSA, Inc. v. King County, 804 F.2d 1104 (9th Cir. 1986); International Food & Beverage Sys. v. City of Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986).

90. 804 F.2d 1104 (9th Cir. 1986).

91. *Id.* at 1108. In *BSA*, an ordinance prohibited nude exposure except that which is "expressive dance" and added that "'common barroom type topless dancing' is expressly prohibited." *Id.* at 1107.

92. *See id.* at 1108-09. Specifically, the court concluded that the county had not shown that its interest in reducing a burden on law enforcement could not be achieved by a means less detrimental on protected First Amendment activity. *See id.* In the court's opinion, zoning, operating hour limits, and distance requirements may all serve the state's interests while still protecting the First Amendment conduct. *See id.* at 1109.

93. *See id.* at 1111 (reasoning that ordinance deters public sexual contact, prostitution and other sexual criminal offenses by keeping entertainers out of reach of patrons).

94. *See* International Food & Beverage Sys. v. City of Fort Lauderdale, 794 F.2d 1520, 1525 (11th Cir. 1986) (stating that protection of non-obscene nude dancing is not absolute).

95. 794 F.2d 1520, 1525 (11th Cir. 1986).

96. *Id.* The *International Food & Beverage Sys.* court remanded the case to the district court to determine the constitutionality of a zoning ordinance in light of *City of Renton v. Playtime Theatres, Inc. See id.* at 1528.

97. 911 F.2d 80 (8th Cir. 1990). In *Walker*, a bar owner sought an injunction against the city of Kansas City for denying his permit application for particular zoning required for exotic dance facilities. *See id.* at 84.

The *Walker* court took a more radical position when it asserted that nude dancing should be viewed as obscene activity.[98]

As these cases make clear, current precedent is in flux as to the amount of protection afforded nude dancing under the First Amendment. It is against this constitutional background that the Ninth Circuit rendered its decision in *Colacurcio v. City of Kent.*[99]

## IV. NARRATIVE ANALYSIS

### A. Majority Opinion

In *Colacurcio,* the Ninth Circuit Court of Appeals confronted the issue of whether the City of Kent's ordinance, which required nude dancers to perform at least ten feet from patrons, violated the protection of free expression under the First Amendment of the United States Constitution.[100] The *Colacurcio* majority divided its analysis into four sections, in which it first discussed the level of protection afforded nude dancing under the First Amendment and subsequently evaluated the ordinance under the three-part test set forth in *Ward v. Rock Against Racism.*[101] Applying this test, the majority found that (1) the ordinance was content-neutral; (2) the ordinance was narrowly tailored to serve a significant governmental interest; and (3) there remained ample alternative channels for communication of the information.[102] As was held in *Ward,* the court concluded that the ordinance did not violate the First Amendment and found in favor of the City of Kent.[103]

The majority in *Colacurcio* first discussed the level of protection that has been given to nude dancing under the First Amendment.[104] The court stated, however, that "[t]he fragmented nature

98. *See id.* at 87, 90. The *Walker* court applied the *Miller* test for obscene material and concluded that nude dancing constituted obscenity within the meaning of *Miller. See id.* For a discussion of the *Miller* test, see *supra* note 32 and accompanying text.

99. 163 F.3d 545 (9th Cir. 1998).

100. *See id.* at 548-49. The *Colacurcio* court considered whether the United States District Court for the Western District of Washington erred in concluding as a matter of law that Kent's ordinance did not violate the First Amendment. *See id.* When reviewing a grant of summary judgment, the reviewing court determines *de novo* whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See id.* at 549.

101. *Id.* at 549-58 (citing Ward v. Rock Against Racism, 491 U.S. 781 (1989)).

102. *See id.* (upholding district court's determinations).

103. *See id.* at 557.

104. *See Colacurcio,* 163 F.3d at 549-50. To begin its analysis, the court reiterated the district court's finding that nude dancing is a form of expression under the First Amendment. *See id.* (citing Spence v. Washington, 418 U.S. 405, 410-11

of Supreme Court opinions dealing with nude dancing in particular and sexually explicit but non-obscene conduct . . . has resulted in a lack of clear guidance on the level of First Amendment protection . . . ."[105] In attempting to establish some standard for the level of protection, the court reiterated the district court's reliance on *Barnes v. Glen Theatre, Inc.*, in which the Supreme Court stated that nude dancing "is expressive conduct within the *outer perimeters* of the First Amendment, though . . . only marginally so."[106] The appellants, on the other hand, argued that the Ninth Circuit has afforded nude dancing "full First Amendment protection" and instead relied on the decision in *Kev, Inc. v. Kitsap County*.[107]

After reviewing Supreme Court cases, the Ninth Circuit in *Colacurcio* was still unclear about the level of First Amendment protection that has been afforded to nude dancing.[108] Although the court discussed cases, which seemed to side with less than full First Amendment protection, it also noted one scholar's observation that "no Court has yet squarely held that sexually explicit but non-obscene speech enjoys less than full First Amendment protection."[109] Without determining what level of protection to apply to nude dancing, the *Colacurcio* court analyzed the ordinance to determine whether it was content-neutral.[110]

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(1974)). The Supreme Court has determined that "conduct is expressive when the following two factors are present: (1) intent to convey a particularized message; and (2) a substantial likelihood that the message will be understood by those receiving it." *Colacurcio*, 163 F.3d at 549 n.1.

105. *Id.* at 550.

106. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991).

107. *See Colacurcio*, 163 F.3d at 549-50.

108. *See id.* at 550. The court concluded its discussion of the level of First Amendment protection with further evidence of the uncertainty of the correct standard. *See id.* The court cited several scholars who have also "grappled with the problem of the uncertain status of nude dancing and adult entertainment under the First Amendment." *Id.*

109. *Id.* at 550 (quoting TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-18 p. 938 (2d ed. 1988)). In reviewing the proper standard of First Amendment protection for nude dancing, the *Colacurcio* court examined Supreme Court decisions involving this issue. *See id.* at 550. In *Young v. American Mini-Theatres, Inc.*, a plurality of the Court concluded that adult entertainment should be considered "low value" speech stating, "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." 427 U.S. 50, 70 (1976). Yet, five justices of the Court in *Young*, one concurring and four dissenting, believed that the level of First Amendment protection "should not vary with the social value ascribed to speech by the courts." *Colacurcio*, 163 F.3d at 550 (citing *Young*, 427 U.S. at 73 n.1). Relying on the voting tally taken in *Young*, the Ninth Circuit ascribed full First Amendment protection for nude dancing in its decision in *Kev, Inc., v. Kitsap County*. *See id.* (citing Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1058 (9th Cir. 1986)).

110. *See Colacurcio*, 163 F.3d at 550-53. The court did, however, review the Supreme Court decision in *Barnes v. Glen Theatre, Inc.*, a Supreme Court case de-

The court began its examination of the ordinance under the three-part test set forth in *Ward v. Rock Against Racism*, by determining whether the ordinance was content-neutral.[111] In order to meet the content-neutrality requirement, the relevant ordinance must be "'aimed to control secondary effects resulting from the protected expression' rather than inhibiting the protected expression itself."[112] To determine whether this requirement was satisfied, it was necessary to look to all of the "objective indicators of intent," including the "face of the statute, the effect of the statute, comparison to prior law, fact surrounding enactment, the stated purpose, and the record of proceedings."[113]

After setting forth the correct inquiries for content-neutrality, the court considered the appellants' argument that the legislature's real purpose in enacting the ordinance was to ban adult entertainment in the City of Kent.[114] In support of this argument, the appellants relied on statements made by City officials of the ordinance's Planning Commission, which indicated intent to regulate the actual

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cided fifteen years after *Young*. *See id.* In *Barnes*, a plurality of the Court restated the conclusion from *Young*, namely that nude dancing should only be afforded marginal First Amendment protection. *See Barnes*, 501 U.S. at 560-72. However, in *Barnes*, four justices dissented, stating that nude dancing should be given full First Amendment protection; Justice Scalia, who concurred in the decision, opined that this regulation was not directed at speech at all but rather at conduct. *See Colacurcio*, 163 F.3d at 550 n.3 (citing *Barnes*, 501 U.S. at 593). Justice Souter concurred in the decision and found that nude dancing should be afforded low-level First Amendment protection "noting that 'society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate.'" *Id.* (quoting *Barnes*, 501 U.S. at 584 (Souter, J., concurring)). Justice White, joined by Justices Marshall, Blackmun, and Stevens, argued that nude dancing should be given full First Amendment protection. *See id.* (citing *Barnes*, 501 U.S. at 593 (White, J., dissenting)).

111. *See Colacurcio*, 163 F.3d at 551. The court in *Colacurcio* set forth the First Amendment test: "Municipalities may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are: (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information." *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

112. *Colacurcio*, 163 F.3d at 551 (quoting Tollis, Inc. v. San Bernardino County, 827 F.2d 1329, 1332 (9th Cir. 1987)). More specifically, the *Colacurcio* court stated, "[i]f the ordinance is predominantly aimed at the suppression of First Amendment rights, then it is content-based and presumptively violates the First Amendment. If, on the other hand, the predominant purpose of the ordinance is the amelioration of secondary effects in the surrounding community, the ordinance is content-neutral . . . ." *Id.* (quoting *Tollis*, 827 F.2d at 1332). The court gave examples of secondary effects, "which included, but were not limited to, threats to public health or safety." *Id.*

113. *Colacurcio*, 163 F.3d at 552 (quoting City of Las Vegas v. Foley, 747 F.2d 1294, 1297 (9th Cir. 1984)).

114. *See id.* (bringing forth evidence of city's illicit purpose for enacting ordinance).

expression of exotic dancing rather than the secondary effects.[115] These statements, appellants argued, reveal that the ordinance was "aimed at the suppression of First Amendment rights," rendering it content-based.[116]

The court rejected the appellant's use of these statements as evidence of the purpose of the ordinance.[117] The court stated that individual statements given by City officials were only relevant if "they show[ed] objective manifestations of an illicit purpose . . . such as a departure from normal procedures or a sudden change in policy."[118] Because this ordinance was consistent with the City's comprehensive planning policy, the court decided that the statements were not objective indicators of an illicit purpose and were therefore, not relevant.[119]

The court then turned to appellants' contention that the City's past behavior of adopting "the most restrictive regulations possible" in relation to nude dance studios was a further indication that the City is attempting to suppress the expression of nude dancing rather than its secondary effects.[120] The court, however, rejected this argument, stating that the record rebutted appellants' conten-

115. *See id.* at 552. For example, appellants cited to a statement given by the City Attorney at a Planning Commission meeting: "Since we cannot zone these type[s] of businesses out of the City, the licensing was looked at that was in place for this type of facility . . . . As indicated, these uses cannot be prohibited, but they can be regulated." *Id.* Appellants also relied on a statement given by the Planning Commission Chairman: "With all the regulations we have adopted and stuff, I'm not too concerned that someone's going to come and try to open something up. Because we've made it a little bit difficult for them to make money in the traditional way they make money." *Id.*

116. *Id.* at 550-52.

117. *See id.* (citing *Foley*, 747 F.2d at 1298). In *Foley*, the court stated that individual statements by city leaders were admissible if they "showed the chain of events from which intent may be inferred, rather than merely the subjective intent of individual legislators." *Foley*, 747 F.2d at 1298.

118. *Colacurcio*, 163 F.3d at 552. The court noted that a "departure from normal procedures or a sudden change in policy" was objective evidence of an illicit purpose. *Id.*

119. *See id.* The court stated that "the record [in this case] does not indicate unusual procedural maneuvering on the part of the Kent Planning Committee, Planning Commission, City Attorney, or other City governing bodies." *Id.* Additionally, the ordinance "reflects no procedural lapses that might suggest unjust treatment." *Id.*

120. *Id.* at 552. Appellants, here, relied on the fact that in 1994, the City was forced to change its zoning laws when the district court found the City's ordinance "failed to designate a sufficient number of sites for the location of adult businesses." *Id.* at 548.

tion, showing that the City's restrictions on adult entertainment have "grown more lenient over time."[121]

The *Colacurcio* court, in its conclusion of the content-neutrality prong, discussed the City's development of the ordinance.[122] The court noted that the City presented evidence of the harmful effects that table dancing would have on the community in terms of prostitution, drug dealing, and other criminal activity.[123] This evidence, the court concluded, outweighed the evidence presented by appellants concerning the mixed motivations of some City officials.[124] The court, therefore, found the ordinance to be content-neutral and "justified without reference to speech."[125]

Next, the court addressed the second prong of the three-part test: whether the ordinance was narrowly tailored to serve a significant governmental interest.[126] This prong is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[127] However, a time, place and manner restriction is prohibited from burdening substantially more speech than is necessary.[128]

The court rejected appellants' argument that the ordinance's ten-foot distance rule did not satisfy the narrowly tailored requirement. Appellants' argued that there were less speech-restrictive means of achieving the government interests such as a "no-touch" requirement or a one-foot distance rule.[129] In response to this argument, the court stated that time, manner or place restrictions

121. *Id.* at 552. The record revealed that the City devoted considerable resources to create an ordinance that would be valid under the Constitution. *See id.* at 553. The *Colacurcio* court noted that a comment made by the City Attorney in 1995 indicated this devotion: "These uses cannot be prohibited but they can be regulated . . . the question is where do we put this type of business and how many sites do we allow." *Id.*

122. *See id.*

123. *See Colacurcio*, 163 F.3d at 552.

124. *See id.* at 553. The City presented the court with affidavits and statements made by police officers that documented the "connection between table dancing and illegal sexual activity." *Id.*

125. *Id.*

126. *See id.* at 553 (setting forth *Ward* standard). "A regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests, but it need not be the least restrictive or the least intrusive means." *Colacurcio*, 163 F.3d at 553 (citing Ward v. Rock Against Racism, 491 U.S. 781, 798-99 (1989)).

127. *Id.* (quoting *Ward*, 491 U.S. at 799).

128. *See Colacurcio*, 163 F.3d 553. The court quoted *Ward* in support of this proposition: "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goal." *Id.* (quoting *Ward*, 491 U.S. at 799).

129. *See id.*

"will not violate the First Amendment 'simply because there is some imaginable alternative that might be less burdensome on speech.'"[130] The court, in concluding that the ordinance was narrowly tailored, noted that "courts have emphasized that judges should not supplant the legislature's role in developing the most appropriate methods for achieving government purposes."[131]

Remaining within the narrowly tailored prong, the court next addressed whether the ordinance burdened more speech than necessary.[132] The court, however, stated that this argument was foreclosed by its earlier decision in *Kev*, which upheld a ten-foot distance requirement.[133] Appellants, in turn, argued that the district court did not have the opportunity to apply the *Ward* test in this case since *Kev* was decided prior to *Ward*.[134] This argument failed for two reasons. First, the court stated that it did not have to reach the issue of whether the ten-foot requirement is too burdensome because the "fine-tuning of the distance requirement should be left to the legislative body;" second, appellants' less-restrictive alternatives were not "reasonable" alternatives since they would not "serve the City's purposes in controlling drug transactions and prostitution."[135] In concluding that the ordinance fully satisfied the narrowly tailored prong of the First Amendment test, the court stated that appellants failed to present adequate evidence showing

130. *Id.* at 553 (quoting U.S. v. Albertini, 472 U.S. 675, 689 (1985)). The court stated further that the validity of such a restriction "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Id.* (quoting *Albertini*, 472 U.S. at 689).

131. *Id.* at 553.

132. *See Colacurcio*, 163 F.3d 554 (concluding that district court was correct in following *Kev*).

133. *See id.* at 554. For a discussion of the Ninth Circuit's decision in *Kev*, see *supra* notes 68-72 and accompanying text.

134. *See Colacurcio*, 163 F.3d at 554. *Kev* was decided in 1986, whereas *Ward* was decided in 1989. *See id.* at 550-51. The *Kev* court, therefore, did not use the *Ward* test to determine whether the ordinance burdens too much speech. *See id.* at 554. For a discussion of the standard set forth in *Ward*, see *supra* notes 42-43 and accompanying text.

135. *Id.* at 554. The court cited to several earlier decisions that have upheld ordinances that are similar to that of the City of Kent. *See id.* (citing BSA, Inc. v. King County, 804 F.2d 1104, 1112 (9th Cir. 1986) (upholding six-foot distance requirement)); DLS, Inc. v. Chattanooga, 107 F.3d 403 (6th Cir. 1997) (same)). Moreover, the court stated that the appellants' less restrictive means would be unenforceable, "as both would fail to provide sufficient line-of-vision for law enforcement personnel." *Colacurcio*, 163 F.3d at 554. Additionally, both of appellants' suggestions would "permit verbal communication between dancers and patrons, thereby failing to curtail propositions for drugs or sex." *Id.*

that the ordinance burdened substantially more speech than necessary.[136]

The final prong of the three-part test required the court to review whether the ordinance would "leave open ample alternative channels for communication of the information."[137] Appellants argued that the ordinance clearly failed this prong because table dancing is a unique form of expression fully prohibited by the ordinance, thereby leaving no channels of communication.[138] The court assumed, arguendo that table dancing is a unique form of expression, but the court related that "precedent indicates [that] uniqueness, alone, is insufficient to trigger separate First Amendment protection."[139] In response, the court looked to the purportedly governmental interests protected and weighed these interests against the uniqueness of table dancing.[140] The court concluded that "table dancing in private nightclubs, with documented links to prostitution and drug dealing, was a highly unlikely candidate for special protection under the First Amendment."[141]

The court then continued to address the appellants' claim that banning dancing at a proximity of less then ten feet would in effect leave no alternative channels for this information.[142] The appellants borrowed from a public forum analysis and asserted that the forum in this case should be the area necessary for table dancing rather than the entire bar.[143] Following this argument, then, the

136. *See id.*

137. *Id.* (citing *Ward*, 491 U.S. at 791).

138. *See id.* at 555. Appellants argued that table dancing is "qualitatively different" from nude stage dancing and is therefore entitled to separate First Amendment analysis. *Id.* Appellants further argued that because the ordinance eliminates table dancing altogether, a form of expression where close proximity between patrons and dancers is an essential element, no alternative forms of this communication exist. *See id.* at 555. In support of their contention, appellants introduced evidence of a cultural anthropologist attesting to the "uniqueness of table dancing and the detrimental effect of the ten-foot rule on the dancer's message." *Id.*

139. *Colacurcio,* 163 F.3d at 555. The court stated that "[t]he Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communications *unless* the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting." *Id.* (quoting Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 525-27 (1981)). The court assumed for its analysis that table dancing was a unique form of expression. *See id.*

140. *See id.* at 556.

141. *Id.* The court stated that it was necessary, when assessing a First Amendment claim, to look not only to the private claims in the complaint but also to the government interests being served. *See id.* at 555.

142. *See id.* at 556 (extending public forum principles).

143. *See id.* (leaving no avenues of expression within forum).

ordinance eliminated all channels of information within the table dancing "forum." The court rejected this argument, stating that if it were to follow appellants' line of logic, the court would be required to evaluate lap dancing or any other distinguishable form of nude entertainment as a separate form of First Amendment expression.[144]

Finally, the court addressed appellants' contention that the ordinances' prohibition on tipping along with the distance requirement, would "prevent exotic dancers from making a living in Kent . . . and, in turn, force appellants to go out of business."[145] This prohibition would reach every establishment in the table dancing business and, therefore, would foreclose an entire form of expression.[146] The court rejected this final argument, however, noting that appellants did not present enough evidence to satisfy the applicable test, which required proof that the business could not operate under the regulations at issue.[147]

## B. The Dissent

Judge Reinhardt began his dissent stating that "[b]y requiring nude dancers to perform on a raised platform and to remain at least ten feet away from customers, the City of Kent effectively outlawed table-dancing."[148] Reinhardt believed that the essential question of this case was whether table dancing was a separate form of expression, warranting its own First Amendment analysis.[149]

Judge Reinhardt initially criticized the court for failing to resolve any legal issues in its analysis of the level of protection that should be afforded to nude dancing.[150] Reinhardt argued that the majority left the impression that nude dancing was "low-value"

144. *See Colacurcio,* 163 F.3d at 556. The court stated that appellants' argument failed "due to the incongruity of its potential results." *Id.* The court further reasoned that under this argument, "[a]ny distance requirement, even a one-foot setback, would amount to a flat ban on communication within that 'forum.'" *Id.*

145. *Id.* at 556. Appellants argued that because the table dancers, employed in their establishments, were independent contractors who pay appellants rental fees from their tips, banning tips would make dancers unable to pay and force the closure of the establishment. *See id.* at 557.

146. *See id.* at 557 (rendering regulation violative of the First Amendment).

147. *See id.* (applying test of whether business could operate under regulation).

148. *Id.* at 558 (Reinhardt, J., dissenting). In Judge Reinhardt's view, the district court erred in granting summary judgment. *See id.* at 557-58.

149. *See Colacurcio,* 163 F.3d at 558 (asserting that appellants presented enough evidence to establish triable issue of fact).

150. *See id.* at 558 (rejecting majority's characterization of First Amendment protection).

speech, while failing to note that in the Ninth Circuit "nude erotic dancers [were clearly] entitled to full First Amendment protection for the expressive messages conveyed in their dancing."[151]

Reinhardt then criticized the majority for incorrectly deciding that the ordinance was content-neutral as a matter of law.[152] He stated that, in order to decide this issue correctly, the majority should have evaluated more closely appellants' evidence that table dancing is a unique form of expression warranting separate First Amendment analysis.[153] Reinhardt believed that this issue should have gone to a jury and further reasoned that "[t]o the extent that a reasonable trier of fact might conclude that table dancing and stage dancing are qualitatively distinct forms of expression, the ordinance is itself facially content-based."[154] Finally, Reinhardt concluded that it was inappropriate for either the district court or the Ninth Circuit Court of Appeals to "substitute its own views regarding the purpose and effect of table dancing" and Reinhardt would therefore reverse the district court's grant of summary judgment.[155]

## V. CRITICAL ANALYSIS

The *Colacurcio* court acknowledged that nude dancing is symbolic speech entitled to First Amendment protection.[156] The court correctly identified the test set forth in *Ward v. Rock Against Racism*

151. *Id.* (citing Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1058 (9th Cir. 1986)). Reinhardt criticized the majority for failing to take a closer look at the level of protection afforded to nude dancing, simply because the law in this area is unclear. *See id.*

152. *See id.* Reinhardt stated that the requirement of content-neutrality was satisfied only when the regulation can be justified "without reference to the content of speech." *Id.* (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986)). He believes that the majority concluded the ordinance was content-neutral simply because it was not content-based, thereby failing to consider the real issue of whether table dancing is a distinct form of expression from nude dancing. *See Colacurcio*, 163 F.3d at 558-59.

153. *See id.*

154. *Colacurcio*, 163 F.3d at 559. Reinhardt, to a much larger extent than the majority, evaluated the evidence that appellants presented relating to the issue of whether table-dancing is a unique form of expression. *See id.* In his eyes, this evidence was more than adequate to defeat a motion for summary judgment by the City. *See id.* at 558-59.

155. *Id.* at 559.

156. *See, e.g.*, Barnes v. Glen Theatre, 501 U.S. 560 (1991) (recognizing that nude dancing is protected form of expression under First Amendment); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (finding adult movie theater entitled to First Amendment protection); Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (finding ordinance prohibiting live nude dancing unconstitutional); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality) (affording First Amendment protection to movie theater that displayed sexually explicit films on regular basis).

as the appropriate tool for analyzing regulations of nude dancing entitled to full First Amendment protection; however, the court erred in its application of the first and third prongs of this test.[157] Specifically, the court incorrectly concluded that the ordinance was content-neutral and further erred in determining that the ordinance left open ample alternative channels of communication. More significantly, however, the court failed to recognize that the Kent ordinance not only regulates symbolic speech governed by *Ward*, but it also effectively regulates verbal discourse between a dancer and her patron, which is more properly analyzed under the test set forth in *Brandenburg v. Ohio*.[158]

1. *The Ward Test*

a. Content Neutrality

The *Colacurcio* court's conclusion that the City of Kent's ordinance is content-neutral is erroneous in two respects. First, the court, in rejecting appellants' argument that the ordinance is facially content-based, effectively ignored the differences between stage dancing and table dancing.[159] Second, the *Colacurcio* court, in concluding that the ordinance is content-neutral, failed to recognize that the ordinance is aimed at the suppression of speech rather than the secondary effects stemming from the speech.[160]

The *Colacurcio* court wrongfully rejected appellants' contention that the ordinance is facially content-based because it restricts a unique form of expression.[161] In support of this contention, appellants offered the testimony of a cultural anthropologist and a com-

157. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). For a discussion of *Ward*, see *supra* notes 42-43 and accompanying text. In *Ward*, the Court reasoned that this analysis was the same as the *O'Brien* test: "validating a regulation of expressive conduct . . . in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." *Id.* at 798 (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984)).

158. *Compare Ward*, 491 U.S. 781 (setting forth standard for constitutional regulation of symbolic speech), *with* Brandenburg v. Ohio, 395 U.S. 444 (1969) (setting forth standard for constitutional regulation of unprotected speech that incites illegal activity).

159. *See Colacurcio*, 163 F.3d at 549, 550-53. In fact, the expert testimony offered by appellants was barely mentioned in the majority opinion. *See id.* at 549.

160. *Id.* at 550-53. For a discussion of the secondary effects test espoused in *Tollis* and used by the Ninth Circuit in this case, see *supra* note 63 and accompanying text.

161. *See Colacurcio*, 163 F.3d at 552. In finding that the Kent ordinance was not content-based, the *Colacurcio* court stated that "[t]he ordinance does not distinguish between table dancing and other exotic dance forms," the stated purposes do not "mention the ills of table dancing," and "[t]he ten-foot distance requirement applies to all form of dancing" within adult entertainment establishments. *Id.*

munications expert who both indicated that the proximity between a table dancer and patron is integral to the emotive message that the dancer attempts to convey.[162] Because it is the proximity that distinguishes the "particularized message" conveyed through table dancing from the "particularized message" conveyed through nude dancing, a distance requirement that eliminates this proximity clearly restricts a unique form of expression.[163] This evidence strongly indicated that the ordinance was facially content-based.[164]

Additionally, the *Colacurcio* majority erroneously determined that the ordinance is content-neutral based upon a faulty analysis of the secondary effects test set forth by the Supreme Court in *City of Renton v. Playtime Theatres.*[165] Essentially, this test provides that a

162. *See id.* at 555, 558-59 (Reinhardt, J., dissenting). More specifically, these experts testified that "the message of the table dancer is personal interest in the customer," and that "[t]he entertainer creates an illusion of concern and availability for the customer." *Id.* at 558-59. (Reinhardt, J., dissenting). By contrast, "stage dancing communicates 'the remoteness of the unreachable object of desire' through its use of distance." *Id.* at 559 (Reinhardt, J., dissenting).

163. *See generally* Spence v. Washington, 418 U.S. 405, 410-11 (1974) (finding symbolic speech protected when intended to communicate particularized message); Cohen v. California, 403 U.S. 15 (1971) (holding that words "fuck the draft" embodied significant emotive content to trigger First Amendment protection).

164. *See* BSA, Inc., v. King County, 804 F.2d 1104, 1111 (9th Cir. 1986). In *BSA*, the Ninth Circuit, in finding a distance requirement to be content-neutral, stated: "[t]here is no allegation that the distance requirement between entertainer and patron is an integral part of the expressive activity, or that 'the viewing public is less able to satisfy its appetite for sexually explicit fare.'" *Id.* (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 62 (1976)). In *Colacurcio*, unlike in *BSA*, appellants do argue and present evidence to support that the distance is integral to table dancing's message. *See Colacurcio*, 163 F.3d at 559.

165. *See Colacurcio*, 163 F.3d at 551-53 (citing City of Renton v. Playtime Theatres, 475 U.S. 41, 47-48 (1986)). This test was later espoused by the Ninth Circuit in *Tollis, Inc. v. San Bernardino County* and reads: "If the ordinance is predominantly aimed at the suppression of First Amendment rights, then it is content-based and presumptively violates the First Amendment. If, on the other hand, the predominate purpose of the ordinance is the amelioration of secondary effects in the surrounding community, the ordinance is content-neutral, and the court must then determine whether it passes constitutional muster as a content-neutral time, place and manner regulation." *Id.* at 551 (quoting Tollis, Inc. v. San Bernardino County, 827 F.2d 1329, 1332 (9th Cir. (1997)). The court, however, fails to consider the criticism within the legal community of the "secondary effects" test. *See* McDonald, *supra* note 1, at 351. As Justice Brennan once stated, the "secondary effects" justification for restrictions on expressive conduct "creates a possible avenue for government censorship whenever censors can concoct secondary rationalizations for regulating the content of speech." *Id.* (citing Boos v. Berry, 485 U.S. 312 (1988) (Brennan, J., concurring). Brennan's prophesy seemingly came alive in *Colacurcio*, as evidence presented by appellants strongly suggested that the "secondary effects" rationale employed by this legislature was simply a guise for suppressing a disfavored form of communication. *See Colacurcio*, 163 F.3d at 552. Appellants quoted the following statement made by the City Planning Committee Chairman: "With all the regulations we have adopted and stuff, I'm not too concerned that someone is going to come and try to open something up. Because

regulation is content-neutral if the predominant purpose of the regulation is to ameliorate the secondary effects of the speech on the surrounding community rather than suppressing the speech itself.[166] Although the court in *Colacurcio* bases its application of the secondary effects test on the decision in *Renton*, it is easily distinguishable.[167] Specifically, the ordinance in *Renton* was aimed at dissipating the harmful secondary effects of a concentration of adult theaters by mandating their relocation to specific areas in the community.[168] Thus, the ordinance did not suppress protected speech but merely relocated the speech in order to preserve the quality of urban life.

Moreover, the City of Kent's ordinance, unlike the ordinance in *Renton*, is specifically directed at suppressing the message that is communicated when patrons are less than ten feet from dancers.[169] Appellants contend that the proximity element makes table dancing a unique form of expression.[170] In response, the City argued that it is this very proximity that gives rise to the harmful secondary effects it seeks to combat.[171] The Supreme Court has made clear that a law will not satisfy the secondary effects analysis if the "effect" turns directly upon the communicative impact of the speech.[172]

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we've made it a little bit difficult for them to make money in the traditional way they make money." *Id.* Although this and other statements were dismissed by the *Colacurcio* majority as irrelevant with respect to a statute's intended purpose, they are relevant because they give credence to Justice Brennan's concern for the validity of the "secondary effects" test. *See* Boos v. Berry, 485 U.S. 312 (1988) (Brennan, J., concurring).

166. *See Colacurcio*, 163 F.3d at 551 (citing *Tollis*, 827 F.2d at 1332). In other words, a regulation is content-neutral if it is "justified without reference to the content of the regulated speech." *Id.* (quoting *Renton*, 475 U.S. at 48).

167. For a discussion of the facts and the decision in *Renton*, see *supra* notes 59-62 and accompanying text.

168. *See Renton*, 475 U.S. at 931. Specifically, the City presented evidence of the negative effects of the presence of adult theaters on neighborhood children and community improvement efforts. *See id.*; *see also Young*, 427 U.S. at 50 (finding ordinance aimed at ameliorating harmful secondary effects by relocating adult entertainment establishments constitutional because not aimed at suppressing speech).

169. *See Colacurcio*, 163 F.3d at 559 (Reinhardt, J., dissenting). Although the City does not admit that its purpose was to suppress speech, in reality the ordinance is aimed at the speech rather than at ameliorating the secondary effects. *See id.*

170. *See id.* (Reinhardt, J., dissenting). For further discussion of appellants' uniqueness argument, see *supra* notes 152-55 and accompanying text.

171. *See Colacurcio*, 163 F.3d at 553. The City of Kent offered affidavits and statements by police officers and detectives that documented the connection between table dancing and illegal sexual activity. *See id.*

172. *See* Boos v. Barry, 485 U.S. 312 (1988) (striking down statute prohibiting demonstrations within 500 feet of foreign embassy if demonstrations bring foreign

Surely then, the ordinance enacted by the City of Kent cannot be deemed content-neutral because it is aimed at the very element that gives table-dancing its unique communicative impact.[173]

b. Ample Alternative Channels of Communication

As *Ward* makes clear, a law restricting speech must leave open ample alternative channels of communication.[174] The *Colacurcio* court, in evaluating this prong, failed to consider that the Kent ordinance effectively eliminates table dancing as a form of expression.[175] Table dancers in Kent do not have the option of dancing in a designated zone in the City, as the dancers did in *Renton*.[176] The City of Kent's ordinance, therefore, is not a valid time, place and manner restriction because it fails to leave open ample alternative channels of communication.[177]

2. *Incitement of Illegal Activity under Brandenburg v. Ohio*

Facially, the City of Kent's ordinance restricts a dancer's ability to come within ten feet of her patron in hopes of preventing the verbal communication that the government argues will incite drug

government into disrepute because effect turned directly on communicative impact of speech).

173. *See Colacurcio*, 163 F.3d at 558-59 (Reinhardt, J., dissenting) (asserting appellants' expert created triable issue of fact on content neutrality).

174. Ward v. Rock Against Racism, 491 U.S. 781, 802-03 (1989); *see also* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298-99 (1984). In both *Ward* and *Clark*, neither of the regulations totally banned the activity being regulated. *See Clark*, 468 U.S. at 298-99; *Ward*, 491 U.S. at 803. In *Clark*, an individual could camp overnight as a form of demonstration in a park service designated camping area. *See Clark*, 468 U.S. at 290. Similarly, performers in *Ward* could still use the bandshell. *See Ward*, 491 U.S. at 802.

175. *See Colacurcio*, 163 F.3d at 554-57. Appellants argued that by prohibiting nude dancing at a distance of less than ten feet from patrons, the Kent ordinance left no alternative channels open for table dancing because this form of expression would be banned altogether. *See id.*

176. In *Renton*, by contrast, adult entertainment establishments could still exist within city limits — the theaters merely needed to relocate in order to comply with the statute. *See* City of Renton v. Playtime Theatres, 475 U.S. 41, 47 (1986) (noting that zoning ordinance does not altogether ban activity); *see also* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (same).

177. *See Colacurcio*, 163 F.3d at 559 (Reinhardt, J., dissenting). To take the proximity out of nude dancing is to essentially ban an entire mode of expression. *See id.* The communications expert who testified on behalf of the appellant concluded that:

> The relational and erotic communication sought to be communicated by erotic dance performance is significantly and substantially effected [sic], reduced, and degraded by the requirement that performers be separated from their intended audience by a minimum distance of ten feet.

*Id.*

transactions and prostitution.[178] The *Colacurcio* court correctly addressed this distance restriction under *Ward*, as that is the appropriate test for analyzing restrictions of artistic expression.[179] However, by *only* applying *Ward*, the court failed to address that this ordinance's distance requirement restricts more than just a dancer's artistic expression—it effectively prohibits all conversation a dancer may wish to have with her patron.[180]

According to the Supreme Court, a government wishing to prohibit conversation that may incite unlawful activity may do so only if the speech satisfies the standard set forth in *Brandenburg v. Ohio*.[181] To properly invoke *Brandenburg*, however, the speech must first be speech advocating a crime.[182] The City cannot assume that all speech between a dancer and her patron will be speech advocating a crime. Even if some of the conversations that a dancer has with her patron is intended to incite illegal activity and may be unprotected speech under *Brandenburg v. Ohio*, the ten-foot distance requirement prohibits a dancer's conversation with her patron in its entirety.[183]

## VI. IMPACT

The Ninth Circuit's holding in *Colacurcio* has, at least for the present time, decided that a municipality may constitutionally impose a ten-foot distance requirement between a nude dancer and

178. *See id.* at 553. When met with the option of imposing a "no touch" or one-foot requirement as less burdensome alternatives, the city argued that "both of these options would permit verbal communications between dancers and patrons, thereby failing to curtail propositions for drugs or sex." *Id.* at 554. A ten-foot requirement, by contrast, "covers two arm spans and keeps patrons out of earshot." *Id.*

179. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). For further discussion of *Ward*, see *supra* notes 42-43 and accompanying text.

180. *See, e.g.*, Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1061 (9th Cir. 1986). The municipality in *Kev* enacted a distance requirement to "prevent patrons and dancers from [the verbal discourse which is necessary in] negotiating for narcotics transfers on the premises of an erotic dance studio." *Id.*

181. 395 U.S. 444 (1969). *Brandenburg* provided that speech advocating the use of force or crime can only be proscribed where: (1) the advocacy is directed to inciting or producing imminent lawless action; and (2) the advocacy is also likely to incite or produce such action. *See id.* at 447.

182. *See id.* For further discussion of the facts and analysis of *Brandenburg*, see *supra* notes 36-37 and accompanying text.

183. According to one scholar, there are two sides to *Brandenburg*. *Brandenburg*, "draws a line . . . defining where speech ends and where unprotected utterances begin." David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Border Land of the Brandenburg Test*, 29 GA. L. REV. 1, 5 (1994).

her patron.[184] In arriving at this conclusion, the court has added to the confusing body of case law regarding regulations of nude dancing under the First Amendment.[185] More significantly, the *Colacurcio* decision effectively eliminates table dancing as a unique form of expression, thereby directly impacting the lives of nude dancers and the owners of adult entertainment establishments.

As the court in *Colacurcio* notes, the law surrounding nude dancing and the First Amendment is vague and unsettled.[186] In failing to make any legal conclusions regarding the level of protection to be afforded this type of symbolic speech, the court builds upon the uncertainty already existing within the Supreme Court and its fellow circuits.[187] Perhaps it is time for the Supreme Court to provide some clear guidance as to the proper standard to be applied.[188]

The more obvious effect of the *Colacurcio* decision will be felt outside the legal community by the dancers and owners of adult entertainment establishments. A ten-foot distance requirement will make it difficult, if not impossible, for a dancer to procure tips, which are essential to her survival in this vocation.[189] This, in turn, will force dancers to relocate to another city or to find an alternative means of support. In effect, this will force the owners of these

184. *See Colacurcio*, 163 F.3d at 548.

185. *See id.* at 549-50. The court in *Colacurcio* had trouble determining what level of First Amendment protection is proper in this case. *See id.*

186. For a discussion of cases involving the level of protection of nude dancing, see *supra* notes 50-99 and accompanying text.

187. *See Colacurcio*, 163 F.3d at 558 (Reinhardt, J., dissenting). Reinhardt stated that in determining the proper level of protection, the majority "resolve[d] no legal issues, but [sought] to leave the impression that nude dancing may merely be 'low value' speech entitled to 'only marginal First Amendment protection.'" *Id.*

188. Additionally, this decision effectively allows an ordinance to regulate discussion between a nude dancer and her patron by mandating a distance where this conversation is not feasible. The right of citizens to speak to one another seems to strike at the very core of the First Amendment. If the government is allowed to prohibit such day-to-day conversations merely because of a fear that illegal transactions may occur, it is difficult to see how the First Amendment will continue to protect our freedom to speak.

189. *See Colacurcio*, 163 F.3d at 556-57. Appellants argued that tips obtained from table dances are the main source of revenue for these dancers, who are not compensated for stage dances. *See id.* at 556.

establishments out of business, because their success turns upon the dancer's success.[190]

*Jenna Doviak*
*Gina Scamby*

190. *See id.* at 556-57. Specifically, the distance requirement would prevent exotic dancers from making a living and, as appellants contend, "would make it uneconomical and therefore impossible for adult clubs to open and operate in the city." *Id.* at 556.